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IN THE

Supreme Court of the United States

October Term, 1960

No. 465

DOYLE TERRY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

STANLEY MOSK,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
JACK K. WEBER,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 9171.

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Statement of the Case.

Petitioner was charged, and found by a jury to be guilty, of two counts of child molesting in violation of Section 288 of the California Penal Code and of Sodomy in violation of Section 286 of the California Penal Code. [Clk. Tr. p. 16.] He was sentenced to the State Prison for the term prescribed by law. [Supp. Clk. Tr. p. 1.] He filed a notice of appeal and the judgment of the trial court was affirmed in 180 A. C. A. 46, 4 Cal. Rept. 597. The petition for hearing in the State Supreme Court was denied on June 14, 1960.

Petitioner remained on bail pending the appeal's determination. The record in this case does not disclose it but we represent to the Court that he was subse-

quently convicted for an offense committed while on bail. The charge was that he shot a police officer without provocation. He was found guilty, sentenced to death, his motion for new trial was denied, and he is at present awaiting appellate review in that proceeding and the execution of the sentence.

Statement of the Facts:

There seems little purpose in setting forth an extended description of the facts constituting the crime. There has already been filed with the Court a certified copy of our brief in the reviewing court. In the unlikely event that this Court should have reason to refer to those facts, the summary we have compiled there may prove to be of assistance.

The chief issue on the appeal in the state courts, and the question raised in this Court, turns on the admissibility of prior testimony of the victims of the offense. Again, these are matters set out fully in our original brief. A fair summary of the evidence is contained in the opinion of the California District Court of Appeal. We shall not attempt to reproduce all of that evidence except insofar as it appears to be in issue here.

The evidence of conviction is almost wholly based on the testimony of the absent witnesses, the victims. This testimony was adduced at a preliminary hearing at which the absent witnesses testified, were confronted by petitioner and cross-examined at great length by him. This testimony was used at the trial when the boys did not show up.

When the police discovered the present offense they not only arrested and commenced proceedings against

appellant and his friends; they also took the two boys into custody. Pursuant to the request of this Court we have caused to be reproduced a certified copy of the records of the Juvenile Court of its proceedings in this matter and they are submitted herewith. Those records were introduced as exhibits at the trial and were before the trial judge in evaluating the admissibility of this evidence.

They disclose a sordid story. The boys had been placed in the custody of their mother when their parents were divorced. Their mother turned the boys over to a Mr. Breckenridge who was to take them on a trip to Las Vegas. Apparently he was not normal sexually. [Juv. Ct. Tr. p. 5]. The boys, 11 and 13 years old at the time of the offense, wrote home and one postcard "was pretty bad". The mother got upset and contacted the police. By this time the boys were in Los Angeles and had been turned over to appellant and his friends. [Juv. Ct. Tr. p. 6.]

The boys at the Juvenile Court Hearing did not want to return to their mother and wanted to be with their father. The boys' father had remarried [Juv. Ct. Tr. p. 7] and wanted them returned to him. He was stationed on the East Coast.

The father's attorney made the following representation to the Juvenile Court.

> "Captain Holden at the same time as he is anxious to have the boys with him also wants to cooperate with the Police Department so far as having Richard and Timothy made available for the preliminary hearing and the trial, if necessary . . ." [Juv. Ct. Tr. p. 8, lines 12-15.]

The attorney transmitted the father's suggestion that the boys be flown back to Washington with the understanding that the boys would be flown back for the preliminary hearing and the trial. [Juv. Ct. Tr. p. 9.]

The Juvenile Court judge did not make a decision at the hearing on August 7, 1958, but made an order detaining them in Juvenile Hall. [Deft. Ex. A and B Juvenile Court Records.] On August 20, 1958, after the preliminary hearing herein, the court ordered their release to the grandmother for transportation back to the father's residence, and they were so released on August 30, 1958. The court concluded that the best interests of the boys would be served by placing them with the father. The findings and orders of the Juvenile Court mention conversations with the District Attorney's office as to the need for the boys to appear in future trials and hearings.

Both the Chief Deputy District Attorney and the Superior Court Judge of the Juvenile Court appeared as witnesses when the trial court considered the foundation for the admission of the prior testimony. The Judge related that the boys fell into a non-delinquent group and that efforts are made to put such boys in the hands of a responsible person as soon as is reasonable. [Rep. Tr. pp. 154-155.] The Judge said he had told the District Attorney he could not detain a person in Juvenile Hall merely because he is a witness. He promised to elicit a guarantee from the person to whom they were released for their appearance at future in-

dicial proceedings. The Judge explained that he had to give first consideration to the welfare of the boys. [Rep. Tr. p. 155.] The District Attorney had said he would rely upon the judgment exercised by the Juvenile Court. The Juvenile Court Judge had occasion to meet Captain Holden during one of the proceedings and was satisfied with his integrity. He relied upon his statement that he would subsequently produce the boys. [Rep. Tr. p. 150.]

The District Attorney testified to the conversation in substantially similar terms. [Rep. Tr. pp. 203-205.] Meanwhile the trial of the case, set for October 25, had been continued to December 4, then to December 5, at appellant's request. The People then obtained a continuance to January 28. [Rep. Tr. pp. 169-170.] The boys and Captain Holden returned not only for the trial on October 25 but also for proceedings in other cases in which the boys were witnesses. On October 21, Captain Holden came into the District Attorney's office with a handful of subpoenas, "very much beside himself and very much concerned". He complained. The District Attorney said he could do nothing, but to pacify him indicated that the case might be disposed of other than by trial, as by plea. The District Attorney said too:

> "... 'we will notify you by letter if and when these cases are actually going to go to trial as to the dates, and if you decide that at that time you are not going to come out here, the children aren't going to be here, and if you have in your mind an

impelling reason why they shouldn't be here, will you please write a letter to us and so indicate." [Rep. Tr. p. 208, lines 8-13.]

It was not questioned at the trial that the boys actually were in Virginia at the time. The prosecution introduced considerable evidence as to phone conversations with the father, who said he thought it injurious to the boys to be brought across country with such frequency. [Rep. Tr. pp. 30-37.] Appellant was furnished with their address and phone number. In addition to the phone conversations letters were sent to the Hildens. [Rep. Tr. pp. 54-68; see People's Exs. 4, 5, 6.]

Prior to the continuance of the October 25 trial, a police officer discussed the case with counsel for petitioner, who was starting a murder trial, and waived the continuance for that reason. [Rep. Tr. p. 188.] He was informed that the boys and their father were going to be in Los Angeles and that it would inconvenience them to make another trip. Counsel replied that there were other trials too, and it would be just as easy to bring them out for all of them at once. [Rep. Tr. pp. 189-191.]

Question Presented

Did the use of the testimony from the former hearing violate petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution?

ARGUMENT.

I.

The Use of Former Testimony Is a Well Settled Practice and Violates None of Petitioner's Rights.

It is the universal practice under the common law in virtually all jurisdictions that, if an adequate foundation is laid, testimony from a former hearing may be used.

15 A. L. R. 495;

79 A. L. R. 1392;

122 A. L. R. 425;

159 A. L. R. 1240;

5 Wigmore on Evidence, Section 1398, and cases cited therein.

We do not feel that this court is prepared to hold that 500 years of judicial development and literally thousands of holdings are to be regarded as a transgression of due process.

This is, moreover, the federal practice as well. *Mattox v. United States*, 156 U. S. 237, 15 S. Ct. 333, 39 L. Ed. 409, contains a full consideration of the question and holds that the use of former testimony is proper in federal courts. (See too, *Franzen v. Du Pont*, 51 Fed. Supp. 578, 582; *Christofilos v. United States*, 200 Fed. Supp. 731, 741-743.) It is assumed that if this Court sanctions the practice in the courts it supervises under the Bill of Rights, no fault can be

found in the use of it by the State of California, as codified in Section 686(3) of its Penal Code.

We submit that the rights of petitioner were better protected here than they might have been elsewhere. Under federal law impeaching testimony may not be introduced without a foundation which, in the absence of the witness, it is difficult to lay. (See *Mattox, supra*; *Palakiko v. Harper*, 209 F. 2d 75, 103.) In California no foundation is needed in these circumstances. (*People v. Collup*, 27 Cal. 2d 829.) Under this rule appellant put in parts of the Juvenile Court transcript and various crime reports signed by the boys. [See Rep. Tr. pp. 459-469], as well as prior statements allegedly made by them, all of which purported to impeach.

Appellant also requested and received special instructions to the effect the jury could weigh the fact that the witnesses were not cross-examined in their presence. [Clk. Tr. p. 33.] The jury was also told that if they felt from the lack of opportunity for observing an absent witness they could not determine his credibility, that factor alone may create a reasonable doubt. [Clk. Tr. p. 34.]

Neither should his loss be overvalued. (*People v. Valdez*, 82 Cal. App. 2d 744, 749; 5 Wigmore on Evidence, Sec. 1396.) Appellant subjected the witnesses to an intensive examination at the preliminary hearing. The prosecution may have lost more by their absence than appellant.

II.

The Witnesses Were Not Unfairly Placed Beyond Petitioner's Reach.

Petitioner contends that the state ordered the witnesses across country, in effect becoming responsible for their absence, and then capitalized on it by utilizing their former testimony. He cites *People v. Kiihoa*, 53 Cal. 2d 748, 3 Cal. Rept. 1, 349 P. 2d 673, a holding to the effect that the prosecution cannot be responsible for the absence of a material witness and still prosecute. (*Cf., People v. Hammond*, 54 A. C. 884.) He feels that this holding controls the present case, yet it seems to us that there are important differences. It is not the District Attorney here who is ordering the boys out of the state. It is the Juvenile Court, a court which is acting as the trustee of the welfare of these boys. Under California law this court is bound by a consideration only of the welfare of the child. (*In re Singer*, 134 Cal. App. 2d 547, 551.) The court may not take into consideration other factors, such as their appearance at the criminal proceedings, unless it is consistent with their welfare. This is how the court approached the problem and this is how it solved it. The boys were placed with their father on his promise that he would return them for the criminal proceedings.

We submit that this Court should not lightly intrude on this standard of conduct set for the California Juvenile Courts. To upset it might induce these courts to act in a manner not consistent with the best interests of the children.

Consider what might have happened in the present case. It does not take a child psychologist to tell that these boys had endured an experience in being exposed

to a ring of homosexuals that could leave scars on their personalities for life. Nor do we need a child psychologist to tell us that it is important to terminate their adventures as soon as possible, to remove them from all possible contact with their homosexual companions, and to place them again in a normal family life with strict discipline. This is the course that the Juvenile Court took. The judge was plainly dissatisfied with the way the mother cared for the children. He had met the father, who had a military background, and who had remarried and could provide the kind of regularized family life the boys needed. 3000 miles away from all possible further contact with these individuals.

To relate these facts is to demonstrate the propriety of the court's action. It isn't even arguable but that it was the right thing to do. Why then should the state, which has no reasonable alternative but to do what is best for the children, be punished for doing that? We submit that when the state acts as a trustee of the welfare of the children it has no responsibility to see that the necessary acts it takes in that direction cause no injury to petitioner. However, here the state did not adopt a course of conduct bound to hurt petitioner. It secured the promise of a reputable person that the boys would testify as needed.

Petitioner suggests that the District Attorney induced the witnesses to stay away, yet the record does not bear him out. The District Attorney merely wanted to be informed if, in some eventuality, the witnesses could not return.

Petitioner relies on *Mates v. United States*, 178 U. S. 458, 20 S. Ct. Repts. 993, 999-999, 44 L. Ed. 1150. There the court held that the prosecution could

not build a foundation for the admission of evidence on its own negligence. The witnesses had been seen in the courthouse an hour before trial. There is no comparable conduct in the present case. Our situation is entirely different.

III.

Petitioner Was Not Hurt by the Manner in Which the Foundation Was Laid.

Petitioner claims federal error because the jury heard the evidence concerning the foundation. The reviewing court applied a well-defined rule in the law to the effect that while it is the better practice to hear legal questions in the absence of the jury, it is not improper to do so unless the minds of the jurors might be prejudiced thereby. (53 Am. Jur., Trial, §§21-23; Wharton's Criminal Law and Procedure, Vol. 5, p. 195.) The reviewing court did not find error in the taking of the foundation in front of the jury. It merely found that nothing had been said that really prejudiced petitioner. We fail to see any conceivable federal question here. Petitioner makes no complaint of the standard applied by the opinion. His only differences are over the factual determination. We do not feel that that is sufficient grounds for the intercession of the United States Supreme Court. The jury was told that it was not to consider what it heard on the question of guilt or innocence. [Rep. Tr. p. 11.] The purpose of the procedure was to explain the absence of the witnesses.

Conclusion.

It must be borne in mind that the question we are here concerned with is one of the admissibility of evidence. A criminal trial is an adversary proceeding an

petitioner was not precluded from ameliorating any possible loss he might have suffered. Prior to the time the witnesses left the jurisdiction he could have bonded them (Penal Code, Sec. 879) or he could have examined them further. (Penal Code, Secs. 1335-1340.) He did not, despite knowing that they would leave the jurisdiction and were upset about traveling across country so much. After they had refused to return to California he could have had them examined on commission (Penal Code, Secs. 1349-1362) or he might have attempted to compel their attendance. (Penal Code, Secs. 1334-1334.6; see, too, Va. Stats. 1950, Secs. 19-284, as amended in 1954.) There is more too he might have done to ameliorate his loss, by stipulation. It is not impossible to cross-examine over the telephone for example. His conduct at the trial reflected not a single effort to heal his alleged wounds. We cannot help but conclude that his interest was confined to capitalizing on the absence of the witnesses rather than securing their attendance or a substantial substitute therefore. As a result petitioner should not now be heard to complain of due process injuries. Respondent respectfully requests that the application of the petitioner be denied.

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

JACK K. WEBER,
Deputy Attorney General,

Attorneys for Respondent.